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SUPREME COURT, U.S.
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CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 153.

THE SALT LAKE CITY BREWING COMPANY, PLAINTIFF IN ERROR,

vs.

THE FRED W. WOLF COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF UTAH TERRITORY.

BRIEF OF PLAINTIFF IN ERROR.

WILLIAM C. HALL,
Attorney for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

THE SALT LAKE CITY BREWING COMPANY, PLAINTIFF IN ERROR,

vs.

THE FRED W. WOLF COMPANY, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The defendant in error—plaintiff below—by its complaint brought this action to recover from the plaintiff in error—defendant below—$3,745.66 with interest from July 6th, 1891, upon a balance of an account, claimed to be due and owing for merchandise and machinery sold by defendant in error to plaintiff in error, between January 1st, 1891, and the 6th of July, 1891.

A statement of the account is attached to the complaint as an exhibit, and a part thereof. P. 2, print.

The 6th item in the account $6,300, was for the purchase price of one double-acting Linde Refrigerating Machine, size No. 5, together with crank, shaft and fly wheel, etc., etc. and one open condensor of sufficient size for said machine, etc., etc., and a coupler. And to be put up by the defendant in error ready for use in the Brewery of plaintiff in error at Salt Lake City.

The plaintiff in error, answered denying the correct-

ness of the account except as modified in its counter-claim.

In the counter-claim the plaintiff in error states that at the dates mentioned in the complaint, and for a long time prior thereto, it was the owner of and operated a large brewery in Salt Lake City, and ever since has owned and operated the same, and by and in which plaintiff in error brewed large quantities of beer and sold the same.

That shortly before and at the dates mentioned in the complaint, plaintiff in error had enlarged its capacity for brewing more beer and as a part of such enlargement, had constructed additional cellars for cooling and aging beer, preparing same for sale, and in that behalf it became necessary for the plaintiff in error to supply its brewery with additional refrigerating machinery of sufficient capacity to cool and refrigerate said additional cellars and the beer therein to be stored in order that it might be kept cool, sweet and pure while aging or ripening preparatory to placing the same upon the market for sale.

That defendant in error with a full knowledge of these facts sold to plaintiff in error said machinery (see contract p. 4, print) and agreed that the same should be of "the best material and workmanship," etc.

That by the terms of the contract defendant in error agreed that said machinery should be of the best material and workmanship and the condensor to be used therewith should be equal in every respect to the condensor then in use by the plaintiff in error in said brewery.

That plaintiff in error complied with terms of said contract and that defendant in error did not, but violated the same in that said machinery was not of the best material and workmanship, in that the fly-wheel was not true and turned, but rough and the surface upon which the belt is run was broken and patched, and that the flanges on the condensor were and are weak and not strong enough to

hold together when in operation, and the flanges would and did break when the condensor was being operated and continued so to break on the 17th day of May and until the 4th day of July following and until the same had been temporarily banded together by strong iron bands; and also that the condensor was not equal in value or action to the condensor then in use by the plaintiff in error in said brewery, in that there were holes in the same.

That said machinery and condensor were not of the value of more than $2,950, and that on the said 17th day of May, plaintiff in error had brewed one hundred barrels of beer preparatory to putting the same in cellar to be used in connection with said machinery and condensor mentioned in the contract, but by reason of the failure of the machinery and condensor to work, cool or refrigerate said cellar, the beer did sour and spoil and became of no value, and the same was a total loss the same being of the value of $600.

That of the beer brewed by the plaintiff in error and placed in said cooling cellar to age, rest and ripen between the said 17th day of May and the 4th day of July, 1891, 1,725 barrels thereof of the value of $5.00 a barrel, aggregating $8,625 in value, were spoiled and rendered utterly valueless by reason of the said defect in the said condensor, that is to say by reason of the breaking of said flanges thereon, which rendered it impossible during said period, to keep or maintain the temperature of said cooling cellar of the proper and requisite degree for the preservation of the beer placed therein to age, rest or ripen, whereby the plaintiff in error was damaged in the further sum of $8,625.

The case was tried before the court and jury and a verdict found October 21st, 1893, for $2500 in favor of the defendant in error.

On said 21st day of October, when the jury came into court and said they had agreed on a verdict, the names of

the jurors were called by the clerk of the court and answered as to whether or not they had agreed upon a verdict, and upon such call nine of the jurors answered in the affirmative. and three of the jurors answered in the negative, showing that only nine of the jurors had agreed upon the verdict, and that the plaintiff in error, by its attorneys, then and there objected to said verdict, and that it be not received by the court and entered of record as the verdict of the jury, because it was not unanimous, not found by all the jurors, which objection was overruled by the court, and to which ruling the plaintiff in error then and there by its attorneys duly excepted. (See Bill of Exceptions, p. print 11.)

There is but one error assigned and relied upon by the plaintiff in error for a reversal of the judgment; that contained in the bill of exceptions and assignment of errors p. 16 print, namely: that the verdict was not unanimous; being concurred in by only nine of the jurors.

The discussion of error involves the construction or interpretation of an Act of the Governor and Legislative Assembly of Utah Territory, approved March 10, 1892. Laws of Utah, 1892, p. 46, and is as follows:

"CHAPTER XLIV.

"TRIAL BY JURY.

"*An Act to amend Section 3371 of the Compiled Laws of 1888, of the Territory of Utah, in regard to Trial by Jury.*

"Be it enacted by the Governor and Legislative assembly of the Territory of Utah:

"Section 1. That section 3371 of the Compiled Laws of 1888, of Utah, is hereby amended so as to read as follows:

"Section 3371 In all civil cases a verdict may be rendered on the concurrence therein of nine or more members of the jury. When the jury have agreed upon their verdict they must be conducted into court by their foreman. The verdict must be in writing and signed by their foreman if he

is a concurring juror, and if he is not a concurring juror it must be signed by all concurring members and be read by the clerk to the jury, and the inquiry made whether it is their verdict, and the answer may be made by any juror signing the verdict. If more than three jurors dissent, they must be sent out again, but if not more than three jurors dissent, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. Either party may require the jury to be polled, which shall be done by the judge or clerk asking each juror if it is his verdict. If more than three answer in the negative the jury must again be sent out.

"Approved March 10, 1892."

Said section 3371 is as follows—Compiled Laws of Utah, Vol. II, 1888:—

"Sec. 3371. When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foremen. The verdict must be in writing, signed by the foremen, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, they must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict. If any one answer in the negative, the jury must again be sent out."

Article VII, Amendments to the Constitution of the United States, is as follows:

"In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Section 17, Organic Act of Utah Territory, provides:

"That the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory

of Utah, so far as the same or any provision thereof may be applicable."

ARGUMENT.

In discussing the assignment of error (p. 16 print) we contend:

1. That under and by the Constitution of the United States and the 17th section of the Organic Act, a petit jury in a trial of an action at law, in the Territory of Utah, consist of twelve men, properly qualified.

2. That the aforesaid Act of the Governor and Legislative Assembly was unconstitutional and void; therefore if we are correct in this conclusion, the judgment of the lower court, should be reversed and the cause remanded with directions for a new trial.

In support of this position we cite,

41 New Hampshire, 550.
5 Smedes Marshall, 682.
13 N. Y. Ap. 425.
11 Nev. 59.

In the New Hampshire case, in delivering the opinion, the court say:

> "We have considered these questions of great importance and interest, since the trial by jury has been steadily regarded, from the earliest judicial history in England, as the great safeguard of the lives, liberty and property of the subject against the abuses of arbitrary power, as well as against undue excitements of popular feeling. In our own country, almost from its earliest settlement, the trial by jury was claimed by the people as the birthright of Englishmen, and as the most valuable of the rights of freemen; and in the great struggle which secured our national independence, no right of the colonists was more urgently and strenuously insisted upon. We have therefore, examined these questions with anxious care, and we are without any disagreement among ourselves as to the conclusions we

have formed, and which we now proceed to state in answer to those inquiries. We regard it as a well-settled and unquestioned rule of construction that the language used by the legislature, in the statutes enacted by them, and that used by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the Constitution and the laws were adopted.

"The terms 'jury' and 'trial by jury' are, and for ages have been, well known in the language of the law. They were used at the adoption of the Constitution, and always, it is believed, before that time, and almost always since, in a single sense.

"A jury for the trial of a cause was a body of twelve men described as upright, well qualified and lawful men, disinterested and impartial, not of kin, nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly impaneled under the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them, who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issue submitted to them.

"All the books of the law describe a trial jury substantially as we have stated it; and a 'trial by jury' is a trial by such a body so constituted and conducted. So far as our knowledge extends, these expressions were used, at the adoption of the Constitution, and always before, in these senses alone, by all classes of writers and speakers.

"The whole current and drift of the authorities in the United States are, without exception, to the same effect."

The proper and well-settled construction of the Constitutional provision which declares that the right of trial by jury shall remain inviolate, is, that the right of trial by jury shall remain inviolate, as it existed at the formation of the Constitution. Cases which before the Constitution

were not triable, need not be made so now. Parties cannot now be deprived of trial by jury who were entitled to demand it at and before the formation of the Constitution. And, on the other hand, cases not having the right at that time to demand a jury, cannot now demand a jury as of right, because of the Constitutional provision.

Cooley's Constitutional Limitations, 410, note 2, and authorities there cited.

Sedgwick on Statutory and Constitutional Law, 547.

In commenting upon this question the court in Dowling vs. The State of Mississippi, say:

> "Thus while the Constitution must be construed to have adopted the generous privilege of the common law trial by jury in its essential elements, it reasonably follows that whatever was an accidental and not an absolute part of that institution, the mere superfluous forms and complicated proceedings of the English courts, is not necessarily included to have been guaranteed in the right by the clause of the Constitution. It was therefore competent for legislation to point out the mode of impaneling juries, both grand and petit *so long as it did not meddle with the constituents of those bodies.*"

5 Smedes Marshall, 682.

Respectfully submitted,

WILLIAM C. HALL,

Attorney for Plaintiff in Error.

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IN ERROR TO THE SUPREME COURT OF UTAH TERRITORY.

BRIEF OF DEFENDANT IN ERROR.

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SUPREME COURT OF THE UNITED STATES.

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The Legislature of the Territory of Utah passed the following act on March 10th, 1892, to-wit:

> "Sec. 3371. In all civil cases a verdict may be rendered on the concurrence therein of nine or more members of the jury. When the jury have agreed upon their verdict they must be conducted into court by their foreman. The verdict must be in writing and signed by their foreman if he is a concurring juror, and if he is not a concurring juror it must be signed by all concurring members and be read by the clerk to the jury, and the inquiry made whether it is their verdict, and the answer may be made by any juror signing the verdict. If more than three jurors dissent, they must be sent out again, but if not more than three jurors dissent, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. Either party may require the jury to be polled, which shall be done by the judge or clerk asking each juror if it is his verdict. If more than three answer in the negative the jury must be again sent out."
>
> Session Laws of Utah, 1892, p. 46.

Defendant in error brought suit against plaintiff in error in the Third Judicial District Court of Utah Territory and secured a verdict in said district court for $2,500 against plaintiff in error concurred in by only nine of the twelve jurymen impannelled to try the case, upon which judgment was entered. (Transcript p. 10) Plaintiff in error filed its bill of exceptions in the trial court (Trans. p. 11) the material part of which is in the following language, to-wit:

> "On the 21st day of October, 1893, the jury came into court and stated that they had agreed upon a verdict in said action and whereupon the names of the jurors were called by the clerk of the court and answered as to whether or not they had agreed upon a verdict in said action, and upon such call, nine of the jurors answered in the affirmative, and three of the jurors answered in the negative, showing that only nine of the jurors had agreed upon the verdict in favor of the plaintiff and that *the defendant, by its attorneys, then and there objected to the said verdict and that it be not received by the court and entered of record as the verdict of the jury in said action, because the same was not unanimous, not found by all of the jurors, which objection was overruled by the court and to which ruling the defendant then and there excepted.*"

The case was then appealed to the Supreme Court of the Territory of Utah. The Supreme Court affirmed the judgment of the trial court.

Fred W. Wolf Co. vs Brewing Co., 10 Utah, 179.

The plaintiff in error sues out a writ to have this court review the judgment of the courts of the Territory of Utah.

ARGUMENT.

The record presents only one question for review:

Is a judgment good when based upon a verdict of nine of a panel of twelve jurors?

We invite the attention of the court to the case of

Springville City v. Perry A. Thomas, et al., No. 103, which involves the same question presented in the case at bar.

The writ of error should be dismissed because the court has no jurisdiction for the following reasons, to-wit:

(*a*) Because the matter in dispute does not exceed five thousand dollars.

(*b*) Neither is there drawn in question the validity of any statute of, or authority exercised under the United States.

Act of Congress of March 3, 1885, 23 United States Statutes, 443.

I.

The rule is well settled that before this court can exercise jurisdiction upon the questions involved it must appear from the record that the validity of an authority exercised under the United States was drawn in question in the trial court and in the Supreme Court of the Territory.

If it were not necessary that the objecting party should point out specifically and directly, in the lower courts, wherein the validity of an authority exercised under the United States was drawn in question, it would allow the lower courts to rule with eyes closed to the real question, or with reference to general principles only, and then permit counsel, for the first time, in this court to point out what authority was *intended* to be drawn in question by the general objection. Such a rule would be at war with the whole scheme of federal appeals; it would permit counsel to search the record after trial and to engraft upon a general objection a federal question if it appeared upon the chastened reflection of the defeated party that such a question *might* have been presented if it had suggested itself in time.

A careful examination of the record does not disclose that the validity of an authority exercised under the United States or the validity of any act of the legislature, or the power of the court to enter a judgment upon the verdict, was called to the attention of the district court or of the supreme court of the Territory.

See the Bill of Exceptions (Transcript p. 11).

It will be observed therefore that it is nowhere suggested either in the trial court or the supreme court that the validity of any authority exercised under the United States is drawn in question. In the lower court, the only objection is that the verdict is not unanimous. The assignment of error is that the court erred in overruling this objection.

The rule is established that under Section 709, Rev. Stats. U. S., allowing an appeal from a State Supreme Court where there is drawn in question the validity of an authority exercised under the United States and the decision is against its validity, it must appear that the question was actually raised and decided. It is not enough that it might have been or ought to have been raised.

The Victory, 6 Wall. 382.
Gibson vs. Chauteau, 8 Wall. 314.
Powell vs. Brunswick County, 150 U. S. 433, 439.
S. Boom Co. vs. W. B. Boom Co., 110 U. S. 57.

The language conferring jurisdiction of appeals and writs of error from the Territorial courts simply requires that the validity of an authority shall be drawn in question, not that it shall be decided in any particular way. It is therefore necessary only that the record in this case should show that the question was raised. It is immaterial how it was decided. This court should, however, be able to see from the record that the question was presented to the

Territorial courts and that they had the opportunity of passing upon it. To this extent there is no reason why the rule announced with reference to appeals and writs of error from State courts should not apply in cases from the Territorial courts and this seems to be the opinion of this court.

Lownsdale vs. Parrish, 21 How. 290.

That was an appeal from the Supreme Court of the Territory of Oregon. An act of Congress authorized an appeal

> "Where the Constitution of the United States or an act of Congress or a treaty of the United States is *brought* in question."

The only practical difference between that provision and the one under which this writ of error is sought is that the word "drawn" is used instead of the word "brought." They mean, in this connection, the same thing. This court dismissed the appeal in that case saying:

> "Neither the Constitution of the United States nor an act of Congress or a treaty was *'brought* in question' in the lower court; neither side could have legitimately raised such a question and called for its decision; and to give this court jurisdiction of the *case* in this instance the question must have been raised and decided in the lower courts and it must so appear on the record"

In the case at bar it does not appear that the validity of an authority exercised under the United States was 'drawn' in question and to give this court jurisdiction of the *case* the question must have been raised and decided in the lower courts and it must so appear on the record.

In the case of Linford against Ellison, 155 U. S. 503, and the other cases there cited, the court holds that the validity of an authority is drawn in question when the existence or constitutionality or legality of such authority is denied and *the denial forms the subject of direct inquiry.*

In the district court the only objection which was made was to receiving the verdict, for the reason that it was not the unanimous verdict of the jury. No objection was made to the entry of the judgment upon this verdict.

II.

Even if the case involves the validity of an act of the Territorial Legislature there is not drawn in question thereby the validity of an authority exercised under the United States.

There is a marked difference between the act of Congress providing for appeals and writs of error from the Territorial supreme courts, and the law allowing appeals and writs of error from the State supreme courts. In the latter, the jurisdiction applies in a much more numerous class of cases than in the former.

Rev. Stats. U. S., Sec. 709.

A comparison of them however, we think, will reflect some light on the question at bar. Under the latter act an appeal is proper; first, where there is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity; or, second, where there is drawn in question the validity of a statute or an authority exercised under any State on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity; or, third, where any right, title, privilege or immunity is claimed under the constitution of or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the right, title. privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority. The object

of the statute in all three cases seems to have been the same, viz: to allow a review by the Supreme Court of the United States whenever the force or applicability of the national constitution, legislation or authority was denied by the State Supreme Court. It was no part of the scheme to allow a review where the effect of the decision of the State Supreme Court was to extend or uphold the constitution, legislation or authority and not to restrict or deny the same.

If the law of a State were challenged on the ground of its repugnance to the constitution or statutes of the United States and the State court held it invalid, or if the validity of an authority exercised under the United States was questioned and the authority was upheld by the State Supreme Court, no review by the Federal Supreme Court was contemplated.

Suppose, therefore, Utah Territory having become a State, the Supreme Court of the State, following the Territorial Supreme Court, should hold the act of the legislature valid and an appeal from such decision should be taken; if upon such appeal it should be held that the language "where there is drawn in question the validity of an authority exercised under the United States" applied to a case where the validity of a Territorial law was drawn in question, the decision of such State Supreme Court affirming the validity of the Territorial law would be a decision in favor of the validity of the authority exercised under the United States, and under the provisions of Section 709 would not be subject to review by this court; but if the question before the State Supreme Court was as to the validity of a State law and the decision was in favor of the validity of such law, then it would be reviewable, and we would be confronted with the anomaly of the Supreme Court of the United States reviewing the question of the

validity of a *Territorial* law where the Supreme Court of the State had decided against its validity, and reviewing the validity of a *State* law where the State Supreme Court had decided in favor of its validity, and *vice versa*.

Such a construction would be at war with the purpose of the statute. By the words, "where is drawn in question the validity of an authority exercised under the United States," it was intended to embrace a case where there was drawn in question the validity of the primary authority itself as distinguished from an act of such authority. If this is the proper construction of this language in Section 709, why should not the same language in the act of 1885 providing for appeals from Territorial courts receive the same construction? And if so, an appeal would not be authorized in a case where the validity of the law of a Territorial legislature was drawn in question; and to this effect are the decisions of this court.

In Miners' Bank vs. State of Iowa, 12 How. 1, the facts were: The Territory of Wisconsin had created a corporation called the Miners' Bank of Dubuque. After the separation of Iowa from Wisconsin, the legislature of Iowa Territory repealed the act incorporating the bank. It was claimed by the plaintiffs in error that this latter act was unconstitutional "as a law arbitrarily abrogating the charter of the bank and therefore a law impairing the obligation of a contract."

After the Territory of Iowa became a State, the question came before the State supreme court. This court held the law valid and the case went by appeal to the Supreme Court of the United States. This court, however, held that an appeal would not lie, and in the course of the decision, referring to the 25th section of the law establishing the judicial courts of the United States, says (page 6):

"By recurrence to that section it will be perceived in order to give the corrective power to this tribunal, that by the decision of the State court there must have been drawn in question the validity of a statute or of an authority exercised under the United States, and the decision must be against their validity, etc.

"By a comparison of the record before us with the section of the judiciary act above quoted, we think it nowhere apparent that there has been by the decision of the court of Iowa, drawn in question the validity of a treaty or statute of or an authority exercised under the United States, much less that there has been a decision against the validity of either."

The Court, it seems to us, very clearly announces its opinion, therefore, that the fact that there is drawn in question the validity of a Territorial law does not draw in question the validity of an authority exercised under the United States; and that a decision upholding the validity of a Territorial law is not a decision against the validity of an authority exercised under the United States.

See also,

Messenger v. Mason, 10 Wall. 507 (510).

An authority directly in point, however, and, if followed, conclusive of the question, is the case of Smith vs. Adams, 130 U. S. 167. There the court construing Section 2 of the Act of Congress of March 3, 1885, declared that to challenge the validity of a Territorial law did not present a question for the review of the Supreme Court within the meaning of the act. The appeal in the case referred to was from the Supreme Court of the Territory of Dakota. The facts were that the political code of Dakota, in force in 1886 providing for the organization of counties and location of county seats, authorized certain commissioners to locate the county seat temporarily and until an election was held and a permanent county seat designated

by a majority of the votes cast at such election. On the thirtieth of July, 1886, Congress passed an act prohibiting the passage of local or special laws by the Territories of the United States and among other things enacted that the legislatures of such Territories should not pass local or special laws locating or changing county seats, and declaring that such laws should be null and void. Brown County in Dakota was organized under the provisions of the political code, and the city of Columbia was designated by the commissioners as the temporary county seat, and it remained such county seat until some time in 1887, no other place having been designated by the voters of the county. In March, 1887, the Territorial legislature passed an "act to provide for the relocation of county seats in counties where county seats have been located by vote, less than a majority of all the electors voting thereon." Section 1 of this act provided for holding a special election of the qualified voters of such counties having a population of twelve thousand and upwards, where the permanent county seat had not been established under the provisions of the political code, at a time designated, at which election the question of the relocation of the county seat should be voted upon.

Under this act an election was held in Brown County and a majority of the votes were cast in favor of the City of Aberdeen as the county seat. Under a law of the Territory, an elector brought an action to contest the validity of this election upon the ground that the act of the Territorial legislature was in conflict with the act of Congress of July 30, 1886, prohibiting local or special legislation locating or changing county seats; that the language of the Territorial act, though general, was drawn so as to be applicable to but one county, no other county coming within its provisions, and that this fact was known at the

time to the legislature, and that the object of passing the act was to evade and nullify the act of Congress. The supreme court of the Territory held that the act of the Territorial legislature was in conflict with the act of Congress prohibiting special legislation, and from this decision of the Territorial court an appeal was taken to this court. A motion to dismiss the appeal was submitted, on the ground, among others—

> "That no question is presented involving the validity of any patent or copyright, nor is there drawn in question the validity of a treaty or statute of or authority exercised under the United States."

This court after quoting the provisions of the act of Congress of March 3, 1885, say:

> "The objection that no federal question is involved undoubtedly has reference to the second section of the above act, which provides that the appellate jurisdiction of this court over cases from the Territorial courts shall not be determined by the amount in dispute if the validity of a treaty or statute of or authority exercised under the United States is drawn in question, but that in such cases an appeal or writ of error may be brought without regard to the sum or value in dispute. *No such question being involved, our appellate jurisdiction in this case depends apon whether the amount in dispute exclusive of costs exceeds the sum designated.*"

The court held that the jurisdictional amount was not involved, and upon this and other grounds dismissed the appeal.

In the recent case of Linford v. Ellison, 155 U. S. 503, the same rule is announced.

In that case the legislature of Utah Territory had passed an act which empowered the City of Kaysville to assess taxes upon agricultural lands within the corporate limits of the city but beyond the range of municipal benefits.

This law it was claimed was opposed to the fifth amendment of the federal constitution, so that the constitutionality of the law was involved. The supreme court of the Territory held that the law was unconstitutional and void. This court, however, dismissed the appeal, holding that the decision of the supreme court—

> "Involved the construction of the organic law and the scope of the authority to legislate conferred upon the Territorial legislature; but that the validity of that authority and of the statute [the organic act passed by Congress] was not drawn in question."

The court reaffirmed its prior decisions in the cases of Lynch vs. United States, 137 U. S. 280, 285; Baltimore & Potomac Railroad vs. Hopkins, 130 U. S. 210, 226; South Carolina vs. Seymour, 153 U. S. 353, which held in effect that:

> "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed."

The validity of an act done by an authority whose rightful existence was conceded was challenged in each of these cases. In the case at bar, the validity of the primary authority, to-wit, the existence and jurisdiction of the legislature of Utah Territory to legislate generally, is not drawn in question. It is merely claimed that one of its acts is erroneous.

If it had been intended by the statute quoted to allow an appeal or writ of error in every case where the validity of an act of a person or body acting under the authority of the United States was drawn in question, there would be no limit to the cases to which it would apply. If the language of the statute applies to the Legislative Assembly of the Territory, it will apply equally to the judicial depart-

ment, becauses each exercises its authority equally under the United States. Such a construction would lead to absurd results, as this court very clearly points out in the case of Snow vs. United States, 118 U. S. 346.

In this case the appellant Snow had been three times convicted of the same offense, and the court which tried him had therefore violated one of the plainest provisions of the Constitution of the United States. (See case in re Snow, 120 U. S. 274). It was claimed by the plaintiff in error that as the court exercised its authority under the United States and that as such authority had been exercised unlawfully to deprive him of his liberty, that therefore the validity of an authority exercised under the United States was involved; but this court says (page 352):

> "In the present case, the validity of a statute of the United States is not drawn in question. No such question is presented by the bill of exceptions or the request for instructions or the exceptions to the charge or anywhere else in the records, nor is the validity of an authority exercised under the United States drawn in question. Plaintiff in error says that the construction of the act of 1882 is drawn in question and also the authority exercised under the United States by which he was tried and convicted; that the authority of the United States is invoked to deprive him of his liberty in a court established by Congress acting solely by federal power, and that the question is whether the authority exercised by the court under the act of 1882 is a valid authority and within the scope of the act, because the contention is that the court misconstrued the statute and acted beyond the authority which it conferred. The authority exercised by the court in the trial and conviction of the plaintiff in error is not such an authority as is intended by the act. The validity of the existence *of the court and its jurisdiction over the crime named in the indictments are not drawn in question.* All that is drawn in question is whether there is or is not error in the administration of the statute. The contention of the plaintiff in error would allow a writ of error from this court in every

> criminal case in the Territory where the prosecution is based upon a statute of the United States, and indeed it might go still further, for the authority of every court sitting in the Territory is founded on a statute of the United States. From the fact that a given criminal case involves the construction of a statute of the United States, it does not follow that the validity of 'an authority exercised under the United States' is drawn in question."

The distinction we are contending for is clearly shown by a comparision of the cases already cited, with Clough vs. Curtis, 134 U. S. 369.

The facts in that case were that the legislature of the Territory of Idaho had been in session for the full period of sixty days, to which time the life of the assembly had been limited by the act of Congress. An hour after the expiration of the sixtieth day the president of the council declared the council adjourned without day, directed the clerk of the council to enter the order in the minutes, and thereupon the members of the council dispersed. Subsequently they re-assembled, elected a president *pro tem* and proceeded, with the help of the house, which had been similarly organized, to pass a number of acts. There was a direct proceeding which questioned the valid existence of this legisluture assembled under these circumstances. The Supreme Court of the United States thought it was a proper case for an appeal and said;

> "In each case is *directly* drawn in question the *lawful existence* of those bodies as the council and house of representatives of the Territory and consequently the authority which they have assumed as the legislative assembly of the Territory to exercise under the United States."

From the authorities referred to and quoted, this rule may therefore be deduced: That a writ of error will lie where it is claimed that a legislative assembly of a Territory or other person or body deriving its authority from

the United States have no power to *act at all* and not merely where the power to act in a *particular way* is challenged.

If it had been intended to allow a review of the legislation of a Territory by the Supreme Court of the United States, it would have been easy for Congress to have conferred the jurisdiction by plain and explicit language.

Farnsworth vs. Montana, 129 U. S. 113.

So if it had been understood by the language "an authority exercised under the United States," a law of the Territory could be reviewed by this court, the same language would cover an act of Congress, because Congress exercises its authority under the United States, and the enumeration of a "statute of the United States" in the same section would have been superfluous.

In section 709, Rev. Stats. U. S., Congress was careful in every instance to enumerate as the subject of appeal, cases involving the validity of a *statute* as well as an *authority* exercised under any State, and a *statute* as well as an *authority* exercised under the United States. It would seem, therefore, that the failure to provide for a writ of error or appeal where the validity of a *territorial law* was involved was deliberate and intentional.

It was intended to leave the supervision of such laws where it had always rested, viz: with Congress itself.

Miners' Bank vs. Iowa, 12 How. 1, (7.)

Congress has ample power to control and supervise legislation by the Territories. It may declare an act void at its pleasure.

National Bank vs. County of Yankton, 101 U. S. 129, (133.)

It is expressly provided with reference to Utah Territory that—

"All the laws passed by the Legislative Assembly and Governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect."

(Organic Act of Utah, Section 6; approved Sept. 9, 1850.)

III.

Counsel for plaintiff in error contends that the act of the Legislature of Utah, approved March 10, 1892, hereinbefore quoted, is unconstitutional and void because it controvenes the Seventh Amendment to the Constitution of the United States and Section 17 of the Organic Act of Utah Territory.

Article VII, Amendments to the Constitution of the United States, is as follows:

"In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved; and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Section 17, Organic Act of Utah Territory, provides:

"That the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provision thereof may be applicable."

By an examination of the record, it will be seen that none of these questions were raised or considered by the courts below.

The Territorial enactment is not opposed to the Constitution and law above quoted.

(a) The Seventh Amendment to the Constitution of the United States does not apply to Territorial courts and was not necessarily extended over the Territory of Utah by the Organic Act.

The Organic Act extended the Constitution and laws

of the United States over the Territory of Utah "so far as the same or any provisions thereof may be applicable."

The Territorial courts are in no sense United States courts. They are the creatures of Congress and are not provided for in the Constitution of the United States.

Benner vs. Porter, 9 How. 242.
Walker vs. Sauvinet, 92 U. S. 90.
Clinton vs. Englebrecht, 13 Wall. 434.
Hornbuckle vs. Toombs, 18 Wall. 648.

Benner vs. Porter, *supra*, the court said:

> "The distinction between Federal and State jurisdictions, under the Constitution of the United States, has no foundation in these Territorial governments; and consequently, no such distinction exists, either in respect to the jurisdiction of their courts, or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts; Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the Federal and State authorities. There is but one system of government or of laws operating within their limits as *neither is subject to the constitutional provisions in respect to State and Federal jurisdiction.* [The Italics are ours.] They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are creations, exclusively, of the legislative department and subject to its supervision and control. Whether, or not, there are provisions in that instrument which extend to and act upon these Territorial governments, it is not now material to examine. We are speaking here of those provisions that refer particularly to the distinction between Federal and State jurisdiction."

In Clinton vs. Englebrecht, 13 Wall. 447, the court says:

> "There is no Supreme Court of the United States, nor is there any District Court of the United States, in the sense of the Constitution, in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which

they exercise part of the judicial power conferred by the constitution or the general government. The courts are the legislative courts of the Territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States."

(b)—It has been repeatedly held that the Seventh Amendment has no application to suits in State courts, but that its purpose was to guarantee to litigants jury trials in United States or Federal courts only.

Walker vs. Sauvinet, 92 U. S. 90.
Edwards vs. Elliott, 21 Wall. 532.
Pearson vs. Yewdall, 95 U. S. 294.
Cooley Constitutional Limitations, 5 Ed. p. 26.
Eilenbecker vs. Plymouth County, 134 U. S. 31.
Livingston vs. Moore, 7 Peters, 469.

In the case of Walker vs. Sauvinet, *supra*, the court says:

"By Article Seven of the Amendments, it is provided, that:
'In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved.' This as has been many times decided, relates only to trials in the courts of the United States. Edwards vs. Elliott, 21 Wall. 557. The States, so far as this Amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met, if the trial is had according to the settled course of judicial proceedings. (Murray vs. Hoboken, L. and I. Co. 18 How. 280.) Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State."

In the case of Pearson vs. Yewdall *supra*, the court says:

> "We have held, over and over again, that Article Seven of the Amendments to the Constitution of the United States relating to trials by jury applies only to the Courts of the United States, (Edwards vs. Elliott, 21 Wallace 557) and in the statute now under consideration ample provision is made for an inquiry as to damages before a competent Court and for a review of the proceedings of the court of original jurisdiction, upon appeal to the highest court of the State. This is due process of law, within the meaning of that term as used in the Federal Constitution."

Cooley on Constitutional Limitations *supra*, says:

> "These (the Sixth and Seventh Amendments to the Constitution) constitute a guaranty of the right of trial by jury; but, as they do not mention the States, they are not to be understood as restricting their powers; and the States may if they choose, provide for the trial of all offenses against the States, as well as for the trial of civil cases in the State courts, without the intervention of a jury, or by some different jury from that known to the common law."

The foregoing cases settle the proposition that the VII Amendment is not a prohibition upon States, but a limitation upon Federal Courts therefore the amendment is no limitation upon the Territorial courts or the Territorial Legislature in the control of jurors in the Territory of Utah. They are in no sense Federal Courts.

(c)—The Seventh Amendment has no greater effect in a Territory than it has in a State.

The Constitution of the United States in Article IV, Section 3, provides that

> "The Congress shall have power to * * * make all needful rules and regulations respecting the Territory * * * belonging to the United States."

On the interpretation of this clause see

Bank vs. Yankton, 101 U. S. 133.

Reynolds vs. U. S., 98 U. S. 153.
Mormon Church vs. U. S., 136 U. S. 42.
Good vs. Martin, 95 U. S. 98.

Congress has always granted to the Territories a large measure of local self-government.

Clinton vs. Englebrecht, 13 Wall. 434.

It is provided in the Organic Act of Utah Territory that

> "The legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act."

Organic Act, Utah, Section 6.

If our contention is correct then the regulation of the jury system in the Territory of Utah was a rightful subject of legislation and the jury law passed by the legislature is not inconsistent with the Constitution.

By Section 6 of the Organic Act of Utah, Congress intended to place the Territory of Utah, when it was treating of rightful subjects of legislation, upon the same footing as any independent State, reserving however a right to disapprove or annul by affirmative act any law which the legislature might pass.

In the case of Clinton vs. Englebrecht, *supra*, the court says:

> "The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress. As early as 1784, an ordinance was adopted by the Congress of the Confederation providing for the division of all the territory ceded, or to be ceded, into States, with boundaries ascertained by the ordinance. The States were severally au-

thorized to adopt for their temporary government the constitution and laws of any one of the States, and provision was made for their ultimate admission by delegates, into the United States. We thus find the first plan for the establishment of governments in the Territories, authorized the adoption of State governments from the start, and committed all matters of internal legislation to the discretion of the inhabitants, unrestricted otherwise than by the State constitution originally adopted by them.

"Jurisdiction of cases in which the United States were concerned, subject to appeal to the Supreme Court of the United States, was for the first time expressly given to a territorial court in 1805.

"As there is no provision relating to the selection of jurors in the Constitution or the Organic Act, it cannot be said that any legislation upon this subject is inconsistent with either. The method of procuring jurors for the trial of cases is, therefore, a rightful subject of legislation, and the whole matter of selecting, impaneling and summoning jurors is left to the Territorial Legislature.

"Acting upon the theory that the Supreme and District Courts of the Territory were courts of the United States, and that they were governed in the selection of jurors by the acts of Congress, the District Court summoned the jury in this case by an open venire. We need not pause to enquire whether this mode was in pursuance of any act of Congress, for, if such act was not intended to regulate the procuring of jurors in the Territory, it has no application to the case before us. We are of opinion that the court erred both in its theory and in its action."

The general conclusion to be drawn is: That Congress may govern the Territories practically as it sees fit; may give them a very limited or very liberal form of government, or none at all; may give them one court, or many courts; may give them power to enact laws, or withhold this power entirely, and itself legislate, or refuse to legislate at all; may give or withhold local self-government; may appoint all officers, or a part of them, or none of them; may authorize all officers to be elected, or none of them; may make void Terri-

torial legislative acts which otherwise would be valid, and *vice versa*; courts in Territories, though created by Congress are not United States courts, and not subject to the obligations of such courts; this enumeration might be continued indefinitely. In the case above cited, 136 U. S. 44, Justice Bradley says:

> "Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

Congress has supreme power over the Territories and their inhabitants; it has the same power of legislation over the Territories as the people of a State have in framing the fundamental law of the State. This was declared in the case of National Bank vs. Yankton, 101 U. S. 129, in the following language:

> "Congress may not only abrogate the laws of a Territorial legislature but it may itself legislate directly for the local government; it may make a void act of the Territorial legisture valid and a valid act void. In other words it has full and complete legislative authority of the people of the Territories and of all departments ef the Territorial governments. *It may do for the Territories what the people under the Constitution of the United States may do for the States.*"

What is meant by this latter clause which we have italicised? It certainly means that Congress may do for the Territories what the people under the Constitution of the United States may do in framing a constitution for a state government. Of course there is no question but that the right of trial by jury may be entirely done away with by a State constitution. Again in the same case, the court says:

> "The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations."

It is within the power of States to provide for verdicts of less than all of the jurymen, unless restrained by their constitution, as we have heretofore seen. The United States makes its Constitution and laws of the same force and effect in the Territories as elsewhere, and it is fair to presume that the United States did not intend to make its Constitution and laws of more force in the Territories, than in the several States of the Union. We have also seen that Congress has always given to Territories a large measure of local self-government. Congress grants to the Territory the privilege to legislate on all rightful subjects of legislation. Granting the truth of these propositions, it is not unreasonable to assume that Congress intended to permit the legislative assembly of Utah to regulate its jury system.

The control of petit juries in purely Territorial cases, is a rightful subject of Territorial legislation and not inconsistent with the Constitution or Organic Act.

Congress has provided that:

> "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all organized Territories, and in every Territory hereafter organized, as elsewhere in the United States."
>
> Revised Statutes, U. S, Sec. 1891.

(d)—The Territorial law authorizing a verdict by three-fourths of the jury is not in conflict with the spirit and meaning of the Seventh Amendment.

Unanimity was not originally required under the common law. It was not until the latter part of the fourteenth

century that such requirement became established. Numerous cases are cited where the verdict of a less number was received by the courts prior to that time.

See article on the Jury and its Development, by James B. Thayer, Harvard Law Review, Vol. 5, page 296.

Hess vs. White, 9 Utah, 61.

It may well be doubted under the spirit and genius of a form of government such as ours where the rule of the majority applies almost universally in all its departments, whether it was intended by the Seventh Amendment to preserve this requirement for unanimity which was accepted by a people at a time when rule by the majority was practically unknown among them. A majority of this court is sufficient to render a verdict; a majority of the people of the United States are sufficient to elect its highest officers; a majority of all legislative bodies, ordinarily, is sufficient to pass a law.

In the case of Hurtado v. People, 110 U. S. 516, this court, discussing the phrase "due process of law," said:

> "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail the ideas and processes of civil justice are also not unknown. There is nothing in the Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and varied experiences of our own situation and system will mold and

shape it into new and not less useful forms. * * * Restraints that could be fastened upon executive authority with precision and detail might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and while, in every instance, laws that violated express and specific injunctions and prohibitions might, without embarrassment be judicially declared to be void, yet any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and methods of attainment. Such reglations, to adopt a sentence of Burke's, may alter the mode and application but have no power over the substance of original justice."

The Utah Supreme Court in the case of Hess against White, *supra*, after referring to this language, says:

"One of the signs of progress is the provision for a verdict by three-fourths of a jury in a civil cause. Wherever this provision has been tried, it has been found to be a distinct benefit. Such a provision is simply a change in the procedure of applying legal remedies. It is general in its application; it is fair and just to all. No man's property rights are injured by it, and no man can be said to have a vested right in the unanimous action of a jury any more than in the fact that a juror was anciently required to be a freeholder. All litigants could waive in civil trials at common law and under our Constitution this unanimity of verdict. If they conld waive it, then it was not one of the requisites which must be preserved in order to preserve a jury trial in civil actions. For these reasons, because society progresses, and modes and legal procedure must change with that progress, because this enactment is a 'just and reasonable expression of the public will,' because it is calculated to be a great benefit to all classes of litigants, because it reaches justly and fairly and impartially all classes of men, because it is claimed only to be an infringement of a broad and general statement in the Constitution which ought not to be so narrowly construed as

to be a bulwark against progress, we hold that this law was a rightful subject of legislation, and this judgment should be affirmed."

(e)—The Supreme Court of Utah has sustained the validity of the law in many cases.

Hess vs. White, 9 Utah, 61.
American Publishing Co. vs. Fisher, 10 Utah, 147.
Tucker vs. Salt Lake City, 10 Utah, 173.
Fred W. Wolf Co. vs. Brewing Co., 10 Utah, 179.
Mackey vs. Enzensperger, 11 Utah, 154.
Pratt vs. Parsons, 43 Pac. Rep., 620.

The practical operation of the jury law of Utah has been very beneficial. In many cases we have heretofore found that one juror would tie up an entire panel; that some cases had to be tried several times before a unanimous verdict could be reached; that one man might be corrupted and thus defeat the honest judgment of the other eleven. We meet with none of these difficulties now. The law is in harmony with modern progress and modern institutions and should be upheld if not inconsistent with the Seventh Amendment.

We respectfully submit that the writ should be dismissed for want of jurisdiction and the judgment of the lower court affirmed. If the court has jurisdiction the judgment should be affirmed on the merits.

Respectfully submitted,

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